KETUA PENGARAH HASIL DALAM NEGERI v. ENSCO GERUDI (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
S NANTHA BALAN JCA
LEE HENG CHEONG JCA
[CIVIL APPEAL NO: W-01(A)-250-05-2021]
8 MAY 2023

Abstract – *Even though both ss. 140 and 140A of the Income Tax Act 1967 ('ITA') are anti-avoidance provisions, the application of these two provisions is different. Section 140 is wider as it includes all kinds of transactions which the Director General of Inland Revenue ('DGIR') has reason to believe to have the effect, inter alia, of altering, relieving or avoiding any tax liability of a person or hindering or preventing the operation of the ITA in any respect. In such a situation, the DGIR is empowered to disregard or alter any transaction and make further adjustments which the DGIR deems fit to counter the effect of such transaction. On the other hand, the application of s. 140A is more specific and confined to the power of the DGIR to make adjustments and substitute the price on a particular transaction.*

REVENUE LAW: *Income tax – Director General of Inland Revenue – Appeal by Director General of Inland Revenue ('DGIR') against decision of High Court – High Court quashed decision of DGIR – Whether DGIR acted in excess of jurisdiction in failing to act in accordance with earlier decision of High Court – Whether DGIR bound by earlier decision of High Court – Whether DGIR unlawfully invoked s. 140A of Income Tax Act 1967*

This was an appeal by the Director General of Inland Revenue ('DGIR') against the decision of the High Court Judge ('HCJ') in allowing the respondent's application to quash the decision of the DGIR in respect of the additional assessment and the audit findings for the assessment for years of assessment ('YA') 2012 to 2017. The respondent was wholly owned by an American-based company, Ensco Oceanics Company LLC. The legal structure of the Ensco Group of Companies included both the respondent and Ensco Labuan Limited ('ELL'). In order to provide the services to the oil and gas operators in Malaysia, the respondent entered into a master charter agreement ('MCA') with ELL to lease drilling rigs from ELL. The respondent then rented out the drilling rigs to its own customers. As part of the MCA, the respondent agreed to pay ELL a percentage of the applicable day rate that the respondent earned from its drilling contracts with its customers for the drilling rigs. The DGIR initiated its audit on the respondent for YA 2015 to 2017 and requested for further and specific

information and documents from the respondent during the course of the audit. The respondent duly complied with the DGIR's requests. The DGIR issued its first audit findings where it took the position that the pricing of the leasing transactions between the respondent and ELL were not at arm's length pursuant to s. 140A of the Income Tax Act 1967 ('ITA'). The DGIR proposed that the profit earned by ELL should remain with the respondent by reducing the cost of the leasing asset by 20% or equivalent to the margin obtained by ELL. The respondent responded and the DGIR replied that all the responses and explanations by the respondent had been taken into consideration and the relevant adjustment would follow suit. On the issues of the lease and ELL, the DGIR maintained their initial stand. In the High Court, the respondent filed an application to review the decision of the DGIR, on the grounds that the DGIR (i) had acted in excess of its jurisdiction when it failed to act in accordance with the earlier decision of the High Court in *Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* ('*Ensco Gerudi 2013*'); (ii) unlawfully invoked s. 140A of the ITA when it was clear that the respondent and ELL were not 'associated persons' with one another within the definition of the ITA; and (iii) had breached its duty to provide reasons when it issued the decisions without providing any clear reasons and/or justification as to (a) how the respondent and ELL were associated persons; and (b) the DGIR's preferred pricing methodology. The HCJ allowed the respondent's application. In gist, the HCJ was of the view that the issues and facts surrounding *Ensco Gerudi 2013* and this case were the same and therefore, the DGIR's decision not to abide with the decision in *Ensco Gerudi 2013* was by itself an excess of jurisdiction by the DGIR.

Held (allowing appeal)

Per Azizah Nawawi JCA delivering the judgment of the court:

(1) In *Ensco Gerudi 2013*, the DGIR's decision was mainly based on an anti-avoidance case under s. 140(1)(c) of the ITA. The DGIR in that case had invoked s. 140(1)(c) to disregard the transaction between the respondent and ELL. In this appeal, the DGIR's assessment was based on s. 140A of the ITA, which was a new provision. The differences between *Ensco Gerudi 2013* and this appeal were: (i) the use of the provisions of the ITA, s. 140(1)(c) in *Ensco Gerudi 2013*, against s. 140(2) and (3) of the ITA in this appeal; and (ii) the difference in focus between the provisions whereby: (a) in *Ensco Gerudi 2013*, s. 140(1)(c) of the ITA was used in relation to the existence of ELL itself; and (b) in this appeal, s. 140A(2) and (3) of the ITA was used to adjust the rig lease price paid by the respondent to ELL under the transfer pricing audit as the price did not reflect the arm's length price. (paras 34 & 35)

(2) Even though both ss. 140 and 140A of the ITA were anti-avoidance provisions, the application of these two provisions are different in that s. 140 is wider in that it includes all kinds of transactions which the DGIR has reason to believe to have the effect, among others, of altering,

relieving or avoiding any tax liability of a person or hindering or preventing the operation of the ITA in any respect – s. 140(1)(a), (b), (c) and (d). In such a situation, the DGIR is empowered to disregard or alter any transaction and make further adjustment which the DGIR deemed fit to counter the effect of such transaction. In *Ensco Gerudi 2013*, s. 140(1)(c) of the ITA was merely used to disregard the transaction between the respondent and ELL and deemed the transaction was made between the respondent and the non-resident company. On the other hand, the application of s. 140A was more specific and confined to the power of the DGIR to make adjustments and substitute the price on a particular transaction, if the DGIR was of the opinion that the transaction was not at arm's length, in particular to matters relating to transfer pricing and capitalisation. As such, *Ensco Gerudi 2013* could not be said to be binding on this case as the provisions relied on were different. (paras 36-38 & 40)

(3) The DGIR was acting within his jurisdiction and was not acting in excess of his jurisdiction when he decided against the respondent with regard to the tax assessments pursuant to s. 140A of the ITA. Therefore, this did not amount to exceptional circumstances for a judicial review application. The substantive review application should have been dismissed for the parties to proceed with their appeal before the Special Commissioners of Income Tax ('SCIT'). It was an abuse of the process of the court for the respondent to apply for judicial review, whilst at the same time, prosecuting an appeal before the SCIT. It is also trite law that the SCIT has the power to hear a question of mixed facts and law. (paras 44, 45 & 84)

Case(s) referred to:

Bintulu Lumber Development Sdn Bhd v. Director General Of Inland Revenue (Civil Appeal No. 01(f)-28-10-2019 (Q)) (Unreported) ***(refd)***

Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri (Application For Judicial Review No: 25-101-05-2013) (Unreported) ***(dist)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

Kerajaan Malaysia v. Dato' Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor [2017] 2 CLJ 1 FC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

MM Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2013] MSTC 10-046 ***(refd)***

Sun Man Tobacco Co Ltd v. Government Of Malaysia [1973] 1 LNS 144 FC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 HC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 91(3), (5), 99, 113(2)(b), 139, 140(1)(a), (b), (c), 140A(2), (3), (5), (5A), (6)
Rules of Court 2012, O. 53 r. 3

For the appellant - Ahmad Isyak Mohd Hassan & Azleena Md Khairuddin; FCs
For the respondent - Jason Liang Dinghui, Kellie Allison Yap Siu Yiin & Ng Anlynn; M/s Wong & Partners

[Editor's note: For the High Court judgment, please see Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2021] 9 CLJ 918 (overruled).]

Reported by Lina E

JUDGMENT

Azizah Nawawi JCA:

[1] This is an appeal by the Director General of Inland Revenue ("DGIR") against the decision of the learned High Court Judge dated 3 May 2021 in allowing the respondent's application to quash the decision of the DGIR.

[2] The decision of the DGIR is in respect of the notice of additional assessment dated 22 July 2020 and the audit findings dated 23 October 2019, 30 January 2020 and 22 June 2020 for the assessment for year of assessment ("YA") 2012 to 2017. These are based on the DGIR's decision to make adjustments on the respondent's transaction with Ensco Labuan Limited under s. 140A of the Income Tax Act 1967 ("ITA").

[3] Having considered the appeal records and the submissions of all parties, we have allowed the DGIR's appeal and these are the grounds for our decision.

Salient Facts

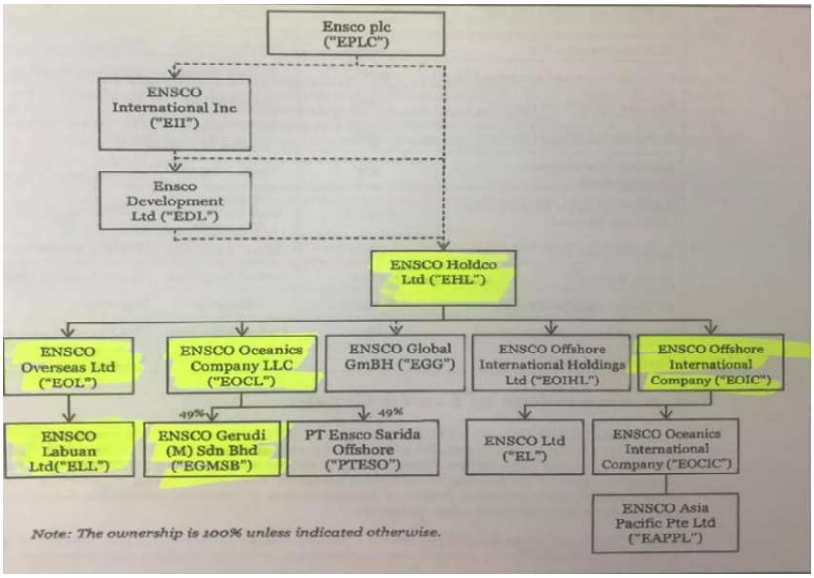
[4] The respondent is a private limited company incorporated in Malaysia on 29 July 1994, and is primarily involved in the business of providing offshore drilling services, including leasing of drilling rigs to oil and gas operators in Malaysia.

[5] From the Transfer Pricing Document ("TP Document") of the respondent, it shows that the respondent is wholly owned by a United States based company, ENSCO Oceanics Company LLC. The legal structure of the Ensco Group of Companies includes both the respondent and Ensco Labuan Limited ("ELL"). From para. 5.1 of the TP Document, both the respondent and ELL are affiliates within the Esco Group:

5.1. Legal Structure

EGMSB is 49% owned by EOCL, a company incorporated in the USA. The ultimate holding company of the Group is Ensco Plc (EPLC), which undertakes its operation through numerous affiliate within the group.

The legal ownership structure of EGMSB during the period under review, mapping out the linkage with its related party companies (*ie*, companies within the ENSCO Group) is shown below:

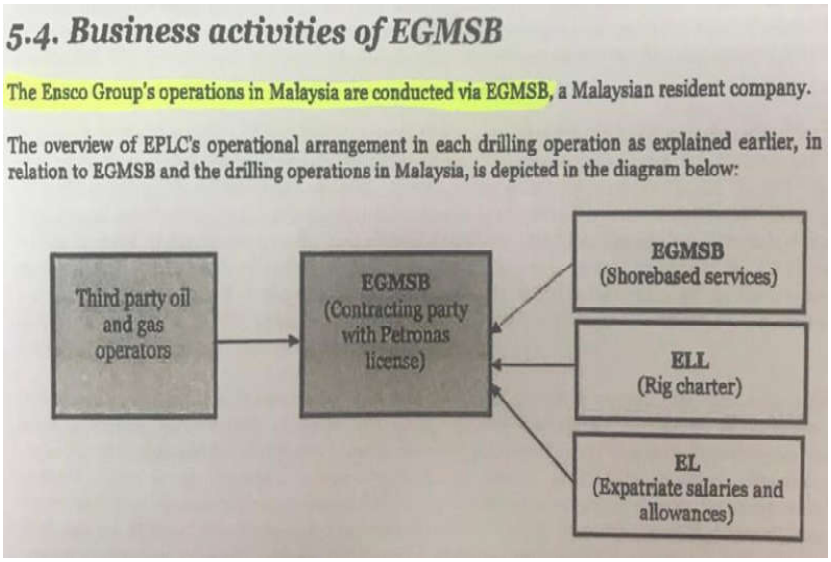

Ensco plc ("EPLC")
ENSCO International Inc ("EII")
Ensco Development Ltd ("EDL")
ENSCO Holdco Ltd ("EHL")
ENSCO Overseas Ltd ("EOL")
ENSCO Oceanics Company LLC ("EOCL")
ENSCO Global GmBH ("EGG")
ENSCO Offshore International Holdings Ltd ("EOIHL")
ENSCO Offshore International Company ("EOIC")
49%
49%
ENSCO Labuan Ltd("ELL")
ENSCO Gerudi (M) Sdn Bhd ("EGMSB")
PT Ensco Sarida Offshore ("PTESO")
ENSCO Ltd ("EL")
ENSCO Oceanics International Company ("EOCIC")
ENSCO Asia Pacific Pte Ltd ("EAPPL")
Note: The ownership is 100% unless indicated otherwise.

[6] In para. 5.4 of the TP Document, the operations of Ensco Group of companies in Malaysia are conducted *via* the respondent and other related companies:

5.4. Business activities of EGMSB

The Ensco Group's operations in Malaysia are conducted *via* EGMSB, a Malaysia resident company.

The overview of EPLC's operational arrangement in each drilling operation as explained earlier, in relation to EGMSB and the drilling operations in Malaysia, is depicted in the diagram below:


5.4. Business activities of EGMSB
The Ensco Group's operations in Malaysia are conducted via EGMSB, a Malaysian resident company.
The overview of EPLC's operational arrangement in each drilling operation as explained earlier, in relation to EGMSB and the drilling operations in Malaysia, is depicted in the diagram below:
Third party oil and gas operators
EGMSB (Contracting party with Petronas license)
EGMSB (Shorebased services)
ELL (Rig charter)
EL (Expatriate salaries and allowances)

[7] In order to provide the services to the oil and gas operators in Malaysia, the respondent entered into a master charter agreement dated 21 September 2006 (amended on 17 August 2011) ("master charter agreement") with ELL, to lease drilling rigs from ELL. The respondent then rents out the drilling rigs to its own customers.

[8] As part of the master charter agreement, the respondent agreed to pay ELL a percentage of the applicable day rate that the respondent earns from its drilling contracts with its customers for the drilling rigs.

[9] By way of a letter dated 12 October 2018, the DGIR initiated its audit on the respondent for the YA 2015 to 2017. The DGIR requested for further and specific information and documents from the respondent during the course of the audit. The respondent had duly complied with the DGIR's requests.

[10] The DGIR issued its first audit findings in a letter 23 October 2019 where it took the position that the pricing of the leasing transactions between the respondent and ELL are not at arm's length pursuant to s. 140A of the ITA. The DGIR proposed that the profit earned by ELL should remain with respondent by reducing the cost of the leasing asset by 20% or equivalent to the margin obtained by ELL.

[11] The respondent responded *via* two letters dated 22 November 2019 and 3 December 2019.

[12] *Via* a letter dated 30 January 2020, the DGIR issued an explanation letter, 'surat penemuan semakan kes bagi TT 2012 hingga 2017' in response to the respondent's letter dated 22 January 2019 and 3 December 2019. The DGIR explained that all the response and explanations by the respondent has taken into consideration and the relevant adjustment will be followed suit. On the issues of the lease and ELL, the DGIR maintained their initial stand.

[13] On 11 February 2020, a meeting was held between the representative of the respondent and the DGIR regarding the issues of payment of lease and ELL. The respondent also issued a letter dated 11 February 2020 to the DGIR.

[14] In a letter dated 28 February 2020, the respondent again explained their stand on the issues regarding the payment of lease and ELL where the respondent contended that these issues had been determined by the High Court and that the DGIR had failed to abide by the High Court case of *Ensco Gerudi (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* (Application For Judicial Review No: 25-101-05-2013) ("*Ensco Gerudi 2013*").

[15] The DGIR issued a letter "surat Pemberitahuan Keputusan Penemuan Semakan bagi Tahun Taksiran 2012 hingga 2017" dated 22 June 2020 to the respondent. Through this letter, the respondent was informed of the final decision of the review and appeal with regard to the issues raised in the letter dated 23 October 2019.

[16] Aggrieved by the DGIR's assessment, the respondent filed an application to review the decision of the DGIR, seeking the following reliefs:

(i) an order for *certiorari* to remove this Honourable Court for the purpose of it being quashed, the decision of the DGIR in the form of notices of additional assessment dated 22 July 2020 and audit findings dated 23 October 2019, 30 January 2019 and 22 June 2020 for years of assessment 2012, 2013, 2014, 2015, 2016 and 2017 amounting to RM10,942,878.05, RM23,834,114.85, RM35,717,009.25, RM25,719,036.25, RM6,430,898.05 and RM4,123,039.57 (collectively amounting RM106,766,976.02), in additional taxes and penalties for the respective years on the following grounds:

Leasing expenses paid to Ensco Labuan Limited for years of assessment 2012 to 2017

(a) the DGIR's decisions are illegal, void and in excess of authority and/or unreasonable when the DGIR attempted to make adjustments on the respondent's transaction with ELL under s. 140A of the Income Tax Act 1967 when the respondent (49% owned by Ensco Oceanics Company LLC, and 51% own by collectively by Prominent Vision Sdn Bhd, Crimson Bay Sdn Bhd

A and Pacific Reward Sdn Bhd) and ELL (wholly owned by Ensco Overseas Ltd) is not an associated person with one another within the definition provided for under the Income Tax Act 1967; and

(b) notwithstanding the above, the DGIR's decisions are illegal, void and in excess of authority and/or unreasonable when the DGIR decided that the payments made by the respondent to ELL for the leasing charges are not concluded at arm's length rate and ought to be calculated based on a profit split method without providing any proper function, asset and risk analysis to justify its assertion;

(ii) a declaration that the DGIR had acted *ultra vires* its powers under s. 91(5) of the Income Tax Act 1967 when it issued notice of additional assessment dated 22 July 2020 for years of assessment 2012, more than seven years after its expiration to make assessment, without providing any basis or any proof to lift the time bar under s. 91(3) of the Income Tax Act 1967;

(iii) a declaration that the DGIR acted *ultra vires* its power when it attempted to invoke s. 140A of the Income Tax Act 1967 without any proper and/or reasonable basis on the applicant's non-associated transaction; and

(iv) a declaration that the leasing expenses paid by the respondent to ELL is done at an arm's length rate as reflected in the respondent's transfer pricing documentations reflecting the respondent's use of the transactional net margin method, in line with s. 140A of the Income Tax Act 1967, Income Tax (Transfer Pricing) Rules 2012 and the respondent's Transfer Pricing Guidelines 2012.

[17] The respondent's application for judicial review is based on the following grounds:

(i) DGIR had acted in excess of its jurisdiction when it failed to act in accordance with the earlier *Ensco Gerudi 2013* case;

(ii) DGIR unlawfully invoked s. 140A of the ITA when it was clear that the respondent and ELL were not 'associated persons' with one another within the definition of the ITA; and

(iii) DGIR had breached its duty to provide reasons when it issued the decisions without providing any clear reasons and/or justifications as to:

(a) how the respondent and ELL were associated persons; and

(b) the DGIR's preferred pricing methodology.

[18] After hearing the parties, the learned judge had allowed the respondent's application and the DGIR's decision was accordingly quashed.

Decision Of The High Court

[19] In the High Court, the issues for determination by the learned judge were as follows:

(i) whether the decision in *Ensco Gerudi 2013* is binding on the parties and that the DGIR's decisions were illegal and in excess of its jurisdiction?

(ii) are the respondent and ELL controlled by the same third person for s. 140A of the ITA to be invoked?

(iii) does the DGIR have a duty to give reasons for its decisions, and if so, has the DGIR breached that duty?

(iv) do the DGIR's actions and/or failures amount to exceptional circumstances for a judicial review application?

[20] Having considered the application and after hearing the parties, the learned judge made the following findings:

(i) that the issues raised by the DGIR's audit have been determined substantively in *Ensco Gerudi 2013* case;

(ii) that the issue of control has been resolved in 2013 and therefore the DGIR cannot invoke s. 140A(2);

(iii) that there is no evidence adduced by DGIR to show that the pricing of the transaction is not at arm's length as the transfer pricing policy between the applicant and the ELL remains the same;

(iv) that the DGIR had the duty to give reasons for its decision in rejecting the respondent's pricing and had failed to do so;

(v) that DGIR had failed to particularise the basis of its exercise of power under s. 91(3) of the ITA and this is fatal; and

(vi) that the DGIR's decision is illegal, unreasonable, made in excess of jurisdiction and a breach of natural justice.

[21] In gist, the learned judge is of the of view that the issue and facts surrounding the *Ensco Gerudi 2013* case and the case before this appeal are the same and therefore, the DGIR's decision not to abide with the decision in *Ensco Gerudi 2013* is by itself an excess of jurisdiction by the DGIR.

Our Decision

[22] It is not in dispute that the respondent has also filed an appeal to the Special Commissioners of Income Tax ("SCIT") under s. 99 of the ITA.

[23] It is trite law that where there is an avenue of appeal to the SCIT, the court would only exercise its judicial review powers in exceptional circumstances, such as a clear lack of jurisdiction or a blatant failure to

perform some statutory duty or a serious breach of natural justice. In *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110; [1987] 2 MLJ 185, the Supreme Court laid down the following principles;

(i) judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant, it will only be exercised in exceptional circumstances; and

(ii) the applicant must show exceptional circumstances, such as a clear lack of jurisdiction or a blatant failure to perform some statutory duty or a serious breach of natural justice.

[24] In *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, the Federal Court made the following findings:

(i) there are certain classes of cases such as planning, employment and tax cases whereby a statute provides for a special appeal procedure, and so the courts understandably may not grant judicial review. However, this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of natural justice [pp. 40B to F]; and

(ii) where the main grounds of judicial review are that the public body had acted unfairly, abused its powers, judicial review is more appropriate, as the issues raised are issues of public importance, going beyond the significance of the case itself [pp. 40H to 41B].

[25] The above principles were adopted by Justice Low Hop Bing in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398; [2004] 6 MLJ 53. On the facts of the case, His Lordship held that the issues of the validity of the notices and the errors of law may be raised as issues before the Special Commissioners, where the applicant is given every opportunity to present its case in the tribunal of the first instance. The High Court decision was affirmed by the Court of Appeal in *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235; [2009] 1 MLJ 555, where this court held at p. 245 (CLJ); p. 567 (MLJ):

> [21] The Supreme Court thus in *Jagdis Singh* had held that the discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure available to the applicant, *certiorari* should not normally issue save in exceptional circumstances (see also *R v. Chief Constable of Merseyside Police; ex parte Calveley & Ors* [1986] QB 424).
>
> [22] To repeat **the guidelines of *Jagdis Singh*, the exceptional circumstances in the circumstances of this appeal required to be established by the appellant were that:**
>
> (a) **the first respondent had a clear lack of jurisdiction; or**

(b) **there was a blatant failure by the first respondent to perform some statutory duty; or**

(c) **there was a serious breach of the principles of natural justice.**
(emphasis added)

[26] In *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197, this court held as follows:

> [22] *The principle that the court retained the power to judicially review the decision of a public authority, but where there was an alternative remedy of appeal, leave to bring judicial review proceedings would only be granted in exceptional circumstances would entail the necessity on the part of the respondent to show to our satisfaction the existence of such exceptional circumstances. The effect of the failure by the respondent to establish special circumstances necessarily followed that the legal precept that an alternative remedy was available and yet to be exhausted would therefore return to the forefront for consideration* (*Ta Wu Realty Sdn Bhd, supra*). The decision in *Jagdis Singh* thus laid down a lucid and authoritative guiding principle enunciated by none other than the highest court of the land which this court was bound to follow. Therefore, the principle remains a good law here that the way is open for this court to hold that the above case authorities should apply to the appeal before us especially when these authorities deal specifically in revenue matters where an alternative and specific remedy is expressly provided under s. 109H of Act 53. *It is beyond question that this position is not an option but the law that ought to be complied with and applied to the instant application.* (emphasis added)

[27] In *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd & Anor* [2017] 2 CLJ 1; [2017] 1 MLJ 563 (FC), Zainun Ali FCJ in Her Ladyship's supporting judgment reasons at p. 30 (CLJ); p. 594 (MLJ) (column H to I) held that, a party who is dissatisfied with an assessment or notice of assessment issued by the revenue has the remedy to exercise its right to appeal under s. 99 of the Act:

> [127] A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under s. 109 or 109B is not left without any remedy. In the circumstance of this case, if it *is dissatisfied with assessment or notice of assessment issued by the appellant, the 1st respondent ought to have exercised its right to appeal under section 99 of the Act.* Before the Special Commissioners, the 1st respondents would have an opportunity to make known its dissatisfaction. It will have the opportunity to tender exhibits and give evidence if necessary. (emphasis added)

[28] The above legal positions were reaffirmed by the Federal Court in *Bintulu Lumber Development Sdn Bhd v. Director General Of Inland Revenue* Civil Appeal No. 01(f)-28-10-2019 (Q), where the apex court had reaffirmed the legal position that the applicant must establish exceptional circumstances to review the DGIR's assessment, when there is a statutory appeal remedy prescribed under the ITA. Otherwise, the court would not intervene, and the taxpayer should dispute the notice of assessment before the SCIT.

[29] Four questions were posed before the Federal Court for its determination in the *Bintulu Lumber Development Sdn Bhd* case which are:

(i) whether the interpretation of Schedule 7A, paras. 9(b) and 9(cc) of the Income Tax Act 1967 (ITA) being a question of law going to the legality of the respondent's conduct in raising notices of additional assessment gives rise to exceptional circumstances justifying the granting of leave for judicial review under O. 53 r. 3 of the Rules of Court 2012;

(ii) whether the question of law being a matter of public importance affecting an important industry of the country's economy would give rise to exceptional circumstances justifying the granting of leave for judicial review under O. 53 r. 3 of the ROC 2012;

(iii) whether it is justifiable for the applicant to challenge the respondent's decision through JR instead of the alternative remedy of SCIT appeal where the issue goes to the very legality of the respondent's conduct; and

(iv) whether the respondent's unilateral decision to impose penalty under s. 113(2) of the ITA upon the applicant: (a) was in excess of jurisdiction or power conferred by s. 113(2); and (b) without affording the applicant the opportunity to be heard and/or reasons for its decision, gives rise to exceptional circumstances justifying the granting of leave for judicial review under O. 53 r. 3 of ROC.

[30] Upon delivering the judgment, the five members of Federal Court judges led by Chief Judge of Malaya, YAA Tan Sri Dato' Sri Azahar bin Mohamed have unanimously decided as follows:

> First of all, we would like to thank both parties for the DGIR and Respondent's counsel for their very helpful and comprehensive submissions, oral and also written which we have considered.
>
> This is our unanimous decision. In respect of Question 1, we answered it in the negative because in our judgment, the DGIR has acted lawfully in following the decision of Schedule 7A of the Income Tax Act by the courts.
>
> In respect of Question 2, we also answered it in the negative. *We are not persuaded that the question of law is a matter of public importance that would give rise to exceptional circumstances justifying granting of judicial review.*
>
> In view of our decision with respect to Questions 1 and 2, we are of the opinion that there is no necessity to answer Questions 3 and 4. For those reasons, we would then dismiss this appeal with cost.
>
> (emphasis added)

[31] Therefore, the guidelines by the Supreme Court in *Jagdis Singh* (*supra*) remain instructive and binding and the onus is on the taxpayer to establish the exceptional circumstances before the court may review the decision of the DGIR with regards to an assessment, instead of pursuing an appeal under s. 99 of the ITA. The taxpayer had to establish any of the following exceptional circumstances:

(i) the DGIR had a clear lack of jurisdiction; or

(ii) there was a blatant failure by the DGIR to perform some statutory duty; or

(iii) there was a serious breach of the principles of natural justice.

[32] The main ground of the respondent's application to review the DGIR's decision is on the alleged clear lack of jurisdiction, and this is encapsulated in issues (i) and (iv) before the learned judge.

(i) Whether The Decision In Ensco Gerudi (2013) Is Binding On The Parties And That The DGIR's Decisions Were Illegal And In Excess Of Its Jurisdiction? And

(iv) Do The DGIR's Actions And/Or Failures Amount To Exceptional Circumstances For A Judicial Review Application?

[33] The respondent took the position, which was accepted by the learned judge, that the decision of the High Court in *Ensco Gerudi 2013*, which was affirmed by this court, binds this case in two ways (see para. 24/written submission):

> (a) The prerequisites that need to be met to invoke Sections 140(6) and 140A (2) are the same. It requires the DGIR to be satisfied that:
>
> EGMSB is in control of ELL or *vice versa*; and/or
>
> to be controlled by some other person who also has control over ELL.
>
> Dato' Zaleha binti Yusof J (as Her Ladyship then was) considered the relationship between EGMSB and ELL, and concluded that the test of control was not met to even invoke Section 140(6). The judgment was approved by the Court of Appeal. The facts surrounding the relationship between the two companies have not changed. The DGIR remains unable to dislodge the factual findings of Her Ladyship. As such, the judgment on "control" continues to bind the parties, and consequently, the DGIR does not have the power to invoke Section 140A(2) against EGMSB.
>
> Indeed, in the present case, the learned High Court Judge Dato' Noorin J came to the same conclusion. Her Ladyship considered the decision in *Ensco Gerudi (2013)* and the DGIR's reasoning in this case in paragraphs 20-40 of her Grounds of Judgment, thereby finding that:
>
> > [21] In the same case, the respondent further attempted to rely on s. 140(6) of the ITA and alleged that the applicant and ELL are within the same group of companies and as such the transaction arising out of the master charter agreement between them were not at arm's length. Notwithstanding the issue arose only in the respondent's written submission therein, the High Court addressed the issue and found that there was no evidence adduced by the respondent showing that the applicant and ELL had transacted on a non-arm's length basis. The High Court found

A that the respondent showed scant scrutiny in proving the applicant to be in control of ELL or *vice versa* and/or to be controlled by some other person who also have control over ELL. The learned High Court Judge, Zaleha Yusof J (as Her Ladyship then was), went on further and stated as follows:

B

> [28] Merely because both companies belong to the same group of companies does not mean that the same person of (*sic*) entity controls them both. Especially when the applicant is also made of Bumiputera shareholders whose interest would be unfairly disregarded. It is important to note that the shareholders of the applicant and ELL are not
C similar at the point of incorporation. In the circumstances, the test applicable to enable the respondent to invoke Section 140(6) of Act 53 are not (*sic*) fulfilled in this case.

(a) Even if the test of control is satisfied, which EGMSB firmly denies, Dato' Zaleha binti Yusof J (as Her Ladyship then was) also made the findings that there is no evidence before the Court that the pricing of the
D transactions was not at arm's length. The transfer pricing policy between EGMSB and ELL have not changed. The transactions in dispute are also the same. Therefore, these findings continue to bind the DGIR and it is not for the DGIR to insist otherwise, see paragraph 28 of the High Court's grounds of judgment in *Ensco Gerudi (2013)*.

E **[34]** We are of the considered opinion that in the *Ensco Gerudi 2013* case, the DGIR's decision is mainly based on an anti-avoidance case under s. 140(1)(c) of the ITA. The DGIR, in that case, had invoked s. 140(1)(c) to disregard the transaction between the respondent and ELL. In the present appeal, the DGIR's assessment is based on s. 140A, which is a new
F provision. The differences in facts and issues between *Ensco Gerudi 2013* case and the present appeal have been summarised by the DGIR to be as follows:

	Ensco Gerudi 2013	***Ensco 2020***
Relevant Provision	Section 140(1)(c) ITA	Section 140A(2) & (3) ITA
Application	Power to disregard certain transaction if the DGIR believe that the transaction has the effect of altering, relieving, evading or avoiding any tax liability of a person or hindering the operation of the Act.	Power to substitute and make adjustment to certain transaction entered between associated person to reflect an arm's length price.

G

H

I

	Ensco Gerudi 2013	*Ensco 2020*
Relevant Provision	Section 140(1)(c) ITA	Section 140A(2) & (3) ITA
Focus of the provision	General anti-avoidance provision which covers any act which has the effect of altering the incidence of tax of a person	Specific provision for transfer pricing
Subject matter	DGIR seek to disregard the existence of Ensco Labuan Limited (ELL) itself and deemed the transaction was made between the Respondent and Ensco affiliate outside Malaysia, hence subject to withholding tax	The DGIR make adjustment to the amount of charter fee payment/lease price paid by the Respondent to ELL as the price does not reflect an arm's length price.
Associated Person	The element of associated person is not a condition to invoke section 140 of the ITA. Hence, the issue of associated person has never been raised during audit and only brought up during submission.	The element of associated person is a condition to invoke section 140A(2) and (3) of the ITA.

[35] Based on the above, we are of the considered opinion and we agree with DGIR that the differences between *Ensco Gerudi 2013* and the present appeal are as follows:

(i) the use of different provisions of the ITA, s. 140(1)(c) in *Ensco Gerudi 2013*, as against s. 140A(2) and (3) of the ITA in the present appeal; and

(ii) the difference in focus between the two provisions whereby:

(a) in *Ensco Gerudi 2013*, s. 140(1)(c) of the ITA was used in relation to the existence of ELL itself; and

(b) in the present appeal, s. 140A(2) and (3) of the ITA was used to adjust the rig lease price paid by the respondent to ELL under the transfer pricing audit as the price does not reflect the arm's length price.

[36] Even though both ss. 140 and 140A of the ITA are anti-avoidance provision, however the application of these two provisions is different, in that s. 140 of the ITA is wider, in that it includes all kinds of transactions which the DGIR has reason to believe to have the effect, among others, of altering, relieving or avoiding any tax liability of a person or hindering or preventing the operation of the ITA in any respect - Section 140(1)(a), (b), (c) and (d). In such a situation, the DGIR is empowered to disregard or alter any transaction and make further adjustment which the DGIR deemed fits to counter the effect of such transaction.

[37] In *Ensco Gerudi 2013*, s. 140(1)(c) of the ITA was used merely to disregard the transaction between the respondent and ELL and deemed the transaction was made between the respondent and the non-resident company.

[38] On the other hand, the application of s. 140A is more specific and confined to the power of the DGIR to make adjustment and substitute the price on a particular transaction, if the DGIR is of the opinion that the transaction is not at arm's length, in particular to matters relating to transfer pricing and capitalisation. (See: para. 22, explanatory statement, Finance Bill 2008).

[39] The difference in the two provisions are as follows:

Section 140	**Section 140A**
Power to disregard certain transactions	Power to substitute the price on certain transactions
(4) The Director General, where he has reason to believe that any *transaction has the direct or indirect effect of:*	(1) This section shall apply notwithstanding section 140 *and subject to any rules* prescribed under this Act.
(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person; (b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return; (c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or (d) hindering or preventing the operation of this Act in any respect, may, without prejudice to such	(2) Subject to subsection (3), where a person in the basis period for a year of assessment *enters into a transaction with an associated person* for that year for the acquisition or supply of property or services, then, for all purposes of this Act, that person shall determine and apply the arm's length price for such acquisition or supply. (3) Where the Director General has reason to believe that any property or services referred to in subsection (2) is acquired or supplied at a price which is either less than or greater than the price

validity as it may have in any other respect or for any other purpose, *disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.*	which it might have been expected to fetch if the parties to the transaction had been independent persons dealing at arm's length, he may in determination of the gross income, adjusted income or adjusted loss, statutory income, total income or chargeable income of the person, *substitute the price in respect of the transaction to reflect an arm's length price for the transaction.* (emphasis added)

[40] As such, we find that the *Ensco Gerudi 2013* case cannot be said to be binding on the present case as the provisions relied on by the DGIR are different. In the present appeal, the DGIR's decision is premised on the new provision, s. 140A of the ITA, whereby the DGIR made an adjustment on the rigs lease price paid by the respondent to ELL on the ground that based on the audit conducted, the lease price of the oil rig did not reflect the arm's length price and did not reflect the market price market price if the transaction was entered into between independent parties.

[41] This new provision (s. 140A) is subject to its own interpretation, in particular the interpretation to the phrase 'enters into a transaction with an associated person for that year for the acquisition or supply of property' in s. 140A(2). Section 140A(2) empowers the DGIR to make pricing adjustments in respect of transactions between associated persons to reflect an arm's length price. This goes to the issue of jurisdiction of the DGIR.

[42] However, the respondent took the position that the DGIR is attempting to readjust the respondent's taxability under the guise of a 'different' provision under s. 140A of the ITA, without regard to the fact that in *Ensco Gerudi 2013*, the learned judge has made findings of law and facts on the requirements of s. 140(6) which are essentially the same as s. 140A(5), on the issues of 'associated person' and 'control'. The learned judge also made the same finding:

> [36] Returning to the *Ensco Gerudi (2013)* decision, the Court of Appeal had upheld the decision of the High Court in 2014. Four years later the respondent initiated the impugned audit herein *ie*, for the YAs 2012 to 2017. It is uncontroverted that the facts surrounding the operations of the applicant and ELL have remained the same. There is no change in facts surrounding the management of the entities to show that there has been a shift in the control since *Ensco Gerudi (2013)*.
>
> [37] *However, to circumvent the court's decision in Ensco Gerudi (2013) the respondent is now applying a different provisions of the ITA on essentially the same facts as that in Ensco Gerudi (2013).* The leasing transactions arising out of the master charter agreement entered between the applicant and ELL

A remains the subject of the current transfer pricing audit, as was the case back in 2013. The respondent's decisions led to the present judicial review application. The only difference is that the respondent now seeks to rely on the latest transfer pricing provision of s. 140A of the ITA to make adjustments to the arm's length price of the applicant's transactions with ELL for the YAs 2012 to 2017. *This court agrees with the applicant's submission*
B *that the respondent is now attempting to re-adjust the applicant's taxability under the guise of a "different" provision under s. 140A of the ITA without regard to the fact that the High Court had already made findings of law and facts on the requirements of s. 140(6) of the ITA which are essentially the same as s. 140A(5) of the ITA. In addition thereto, the High Court had held that the applicant and ELL*
C *are not in control of one another and the decision was then affirmed by the Court of Appeal.* (emphasis added)

[43] We are of the considered opinion that there is no issue of the DGIR 'attempting to circumvent' the decision of *Ensco Gerudi 2013*. The new provision was enacted on 1 January 2009. Since the primary statutory duty
D of the DGIR is to collect taxes, the DGIR is statutorily empowered to collect taxes from the respondent pursuant to s. 140A of the ITA, or any new law that was passed by Parliament. Failure to do so amount to a breach of statutory duty by the DGIR. In *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent (M) Sdn Bhd & Anor* (*supra*), Zainun Ali FCJ went further and
E said that procedural impropriety should not be permitted to vitiate the DGIR's statutory duty to collect taxes:

> [126] … To put it in a nutshell, the allegation of procedural impropriety ought not to be permitted to vitiate the appellant's statutory duty to assess and collect the correct amount of tax.

F **[44]** As such, in answer to issue (i), we are of the considered opinion that the DGIR is not bound by the decision of *Ensco Gerudi 2013* as the DGIR had acted on different provisions of the ITA. Therefore, the DGIR was acting within his jurisdiction and was not acting in excess of his jurisdiction when he decided against the respondent with regard to the tax assessments
G pursuant to s. 140A of the ITA.

[45] Consequently, in answer to issue (iv), we find that since the DGIR had acted within his jurisdiction to impose the taxes under s. 140A, this does not amount to an exceptional circumstance for a judicial review application. The substantive review application should have been dismissed for the parties to
H proceed with their appeal before the SCIT. Indeed, it is an abuse of the process of the court for the respondent to apply for judicial review, whilst at the same time, prosecuting an appeal before the SCIT.

(ii) Are The Respondent And ELL Controlled By The Same Third Person For s. 140A Of The ITA To Be Invoked?

I **[46]** In order to make a finding on 'associated persons' under s. 140A(2), the issue of control comes into play. Thus the next issue is whether the DGIR can invoke s. 140A(2) if the issue of control has been resolved in the *Ensco Gerudi 2013* case.

[47] The respondent took the position that the prerequisite "control" test that applies to both ss. 140(6) and 140A(2) are the same. In order to invoke either provision against the respondent, the DGIR must establish that:

(i) the respondent is in control of ELL or *vice versa*; and/or

(ii) the respondent is controlled by some other person who also has control over ELL.

[48] The respondent then submitted that the issue of 'control' had already been decided in *Ensco Gerudi 2013*. This was accepted by the learned judge in para. 37, where she made a finding that in *Ensco Gerudi 2013*, the learned judge has made a finding on the issue of control. The learned judge held as follows:

> … In addition thereto, the High Court had held that the applicant and ELL are not in control of one another and the decision was then affirmed by the Court of Appeal.

[49] The above finding is based on what the learned judge said in para. [27] in *Ensco Gerudi 2013*:

> [27] This has clearly not been shown from the evidence tendered. There not an iota of evidence and submission to show that the applicant had transacted with ELL on a non-arm's length basis …

[50] However, we are of the considered opinion and we agree with the DGIR that the High Court in *Ensco Gerudi 2013* did not make a finding that the respondent and ELL are not associated persons. What Justice Zaleha in *Ensco Gerudi 2013* had ruled was that, the DGIR had failed to bring evidence to prove that the respondent and ELL are associated persons since the issue was only raised during submission. This is clearly stated by Her Ladyship in para. 24 of the grounds of judgment:

> [24] In the *respondent's submission, the respondent also now attempts to rely on section 140(6) of Act 53 and allege that as the applicant and ELL allegedly belong within the same group of companies, therefore the respondent is allegedly entitled to come to an opinion that those transactions have not been made with one another at arm's length.* With due respect, I agree with the applicant that *this is new allegation and was never raised in the decision being challenged by the applicant.* At no material time did the applicant was notified by the respondent that it is applying section 140(6) of Act 53 in coming to its decision. The respondent also did not at any material time state that it was of the opinion that the transaction is not made with one another at arm's length. *This argument first arose in the written submissions filed by the respondent and not beforehand.* (emphasis added)

[51] In the following paragraph, the learned judge went further to state that the DGIR had not bring any evidence to support the application of s. 140(6) of the ITA:

> [26] Furthermore, as submitted by the applicant, **there is no evidence to support the application of Section 140(6) of Act 53 even if it is to be entertained by this Honourable Court.** The respondent must "establish that a transaction between persons specified in the subsection is not one which would have been made by independent persons or similar activities dealing with one another at arm's length. (emphasis added)

[52] Based on the paras. 24 and 26 of the High Court judgment in *Ensco Gerudi 2013* above, we agree with the DGIR that nowhere in the said judgment did Justice Zaleha hold, either direct or indirectly, that both the respondent and ELL are not associated persons or related, as stated by the learned judge in the present appeal when allowing the respondent's judicial review application.

Whether The Respondent And ELL Are Associated Persons

[53] In any event, we agree with the respondent that the DGIR cannot invoke s. 140A(5A) as the same only took effect on 1 January 2019. For the purpose of the word "control" under s. 140A(5)(c) of the ITA, the relevant provision is s. 139 of the ITA, which reads as follows:

> (1) For the purposes of this Act, a person shall be taken to have control of a company:
>
> (a) if he exercises or is able to exercise or is entitled to acquire control (whether direct or indirect) over the company's affairs and in particular, without prejudice to the generality of the preceding words, if he possesses or is entitled to acquire the greater part of the share capital or voting power in the company;
>
> (b) if he possesses or is entitled to acquire either:
>
> (i) the greater part of the issued share capital of the company;
>
> (ii) such part of that capital as would, if the whole of the income of the company were in fact distributed to the members, entitle him to receive the greater part of the amount so distributed; or
>
> (iii) such redeemable share capital as would entitle him to receive on its redemption the greater part of the assets which, in the event of a winding up, would be available for distribution among members; or
>
> (c) if in the event of a winding up he would be entitled to the greater part of the assets available for distribution among members.

[54] Under s. 139 of the ITA, a person is deemed to acquire control over the company affairs upon the occurrence of any one of the two situations: A

(i) if he possesses or is entitled to acquire the greater part of the share capital in the company; or

(ii) if he possesses or is entitled to acquire the voting power in the company. B

[55] In this case, the facts clearly shows that the majority of shares in the respondent belongs to Ensco Oceanics Company LLC with 980,000 ordinary shares, which make up 49% of the total shares. The remaining 51% of shares were held by three different local companies, namely, Pacific Reward Sdn Bhd (3%), Crimson Bay Sdn Bhd (24%) and Prominent Vision Sdn Bhd (24%). C

[56] Therefore, even though the local companies held a total of 51% cumulatively, each of them held less shares than the Ensco group. As such, we are of the considered opinion that the learned judge had failed to consider the fact that the three local shareholders only hold 3%, 24% and 24% respectively in the respondent. The learned judge has erred in law and in fact when she literally combined the shareholding by the three different and separate entities in the respondent, in order to make a finding that a related company, Ensco Oceanics Company LLC is not a majority shareholder of the respondent. It is not for the learned judge to arbitrarily make a finding based on 51% shareholding for control within s. 139, as this is not specifically provided for in s. 139 itself. D E

[57] As the three local companies are separate entities, each holding 3%, 24% and 24% of the shares respectively, they cannot be said to have control over the respondent as decided by the learned judge in her judgment. The learned judge had absolutely disregarded the 49% shares held by the Ensco group as the real majority shareholder of the respondent company, and this is in line with s. 139 of the ITA. F

[58] In any event, we are also of the considered opinion that the issue of control is not just a legal issue but a factual issue as well. The issue of control is not just limited to 51% shareholding control as submitted by the respondent and accepted by the learned judge. Section 139 provides several circumstances of control, including if the company possesses or is entitled to acquire the greater part of the share capital in the company or if the company possesses or is entitled to acquire the voting power in the company. The voting rights are factual issues which are best left to the SCIT. G H

Issue Of Pricing

[59] On the issue of pricing, this is a factual issue that is best left to the SCIT. We find that the learned judge fell into error when she agreed with the respondent's submission that the DGIR must prepare its own TP Document to justify the adjustments made: I

A [48] … So, *without a Transfer Pricing Report, the Applicant submits that it can only assume that no functional, asset and risk analysis was undertaken by the Respondent and the Respondent does not have good reasons to disagree with the Applicant's Transfer Pricing Documentation.*

B [49] It is apparent that not only the applicant who is left in the dark as to how the respondent came to its transfer pricing adjustments. *The court for that matter is deprive from knowing the respondent's version of what the transfer pricing report ought to be. What are the factors did the respondent consider?* Did it perform the most perfunctory functionary and economic analysis? What are the comparable used in the economic analysis and for that matter, did the respondent comply with its own transfer pricing guidelines?

C (emphasis added)

[60] In a transfer pricing audit exercise, the TP Documents are prepared by the taxpayer to justify their dealings with their related parties (associated person) that was conducted at arm's length. All the information in relation to the company's affairs, transactions, relationship between parties *etc*, are D information within the knowledge of the taxpayer and with these information, a taxpayer prepares their TP Documents based on the transfer pricing guidelines issued by the DGIR. The TP Documents will then be sent to the DGIR who will then conduct an audit on the TP Documents prepared by the respondent taxpayer. It is not for the DGIR to prepare their own TP E Documents on matters which are absolutely within the knowledge of the respondent.

[61] In any event, we are of the considered opinion that the DGIR had in fact given reasons for the adjustments to the respondent. In three separate letters dated 23 October 2019, 30 January 2020 and 22 June 2020, the DGIR F had clearly laid down the reason for the adjustment.

[62] In DGIR's letter dated 23 October 2019, the DGIR had in para. 3 of the 'lampiran 1' given the findings based on the audit conducted on the respondent's TP Documents. Perusing the said paragraph the DGIR had in fact made a analysis on both the respondent and ELL.

G

[63] Added to that, in the letter dated 22 June 2020, the DGIR once again explained in detail the reason for the decision to make the adjustments. Contrary to the learned court judge's findings in para. [49] of the judgment, in this letter, the DGIR had explained how they concluded that the H respondent and ELL are associated persons within the meaning of s. 140A(2) of the ITA, the operational structure of the respondent which involved other affiliate companies within the Ensco Group of Companies. The DGIR has also in this letter explained to the respondent why the DGIR rejected the method used by the respondent in the following paragraph:

I *EGMSB tidak menggunakan kaedah transaksi tradisional (Traditional Transactional Method) dan memilih untuk menggunakan kaedah keuntungan transaksi (Transactional Profit Methods) iaitu Transactional Net Margin Method (TNMM) dalam dokumen-dokeumen pindahan harga yang telah disediakan bagi*

menjustifikasikan transaksi antara syarikat berkaitan yang dibuat. Melalui kaedah ini EGMSB telah memilih beberapa syarikat perbandingan. Mark-up on Value Added Cost (MUVAC) EGMSB akan dibandingkan dengan julat inter-quatile bagi Mark-up on Total Cost (MOTC) syarikat-syarikat perbandingan. EGMSB menggunakan MUVAC kerana berpandangan bahawa kos pajakan pelantar carigali merupakan pass through cost dan tidak perlu dimasukkan dalam MOTC syarikat. Dengan kaedah ini, net margin EGMSB akan berada pada julat inter-quantile yang munasabah …

Dari perbandingan, EGMSB berada dalam julat inter-quatile syarikat-syarikat perbandingan. Oleh itu EGMSB berpendirian bahawa transaksi antara syarikat-berkaitan telah memenuhi prinsip Harga Selengan (Arm's Length).

Namun bergitu, dari penelitian yang dibuat pada dokumen-dokumen pindahan harga EGMSB serta dokumen-dokumen lain yang dipohon, *Pegawai audit berpendapat kaedah TNMM yang digunakan oleh EGMSB adalah kurang tepat kerana pegunaan Profit Level Indicator (PLI) yang tidak selari antara EGMSB dengan syarikat-syarikat perbandingan iaitu antara kaedah MUVAC dan kaedah MOTC.* Disamping itu transaksi Pindahan Harga yang menjadi pertikaian hanyalah transaksi yag dilakukan antara EGMSB dengan ELL yang berkaitan belanja pajakan pelantar carigali yang dibayar EGMSB

Pelantar carigali yang dipajakkan oleh ELL itu diperolehi dari syarikat berkaitan diluar negara. Jadual dibawah menunjukkan analisa fungsi antara syarikat EGMSB dan ELL berkaitan transaksi tersebut …

Dari fungsi yang dikemukan juga, dapat dilihat bahawa transaksi antara EGMSB dan ELL adalah saling berkait dengan aset (pelantar carigali) yang digunakan oleh EGMSB dalam kontrak dengan pelanggan. Setiap pelantar carigali yang dipajakkan ini adalah unik berdasarkan keperluan setiap pelanggan EGMSB. *Oleh sebab itu, berdasarkan sub perenggan 11.4.1(a) Garispanduan Pindahan Harga 2012 dan Perenggan 2.65 OECD Transfer Pricing Guidelines For Multinational Enterprise and Tax Administrations 2017, kaedah TNMM kurang sesuai digunapakai.* Disamping itu, keuntungan yang dipertikaikan telah dikenalpasti, iaitu margin yang diperolehi oleh ELL berjumlah 20% dari pelantar carigali yang dipajakkan kepada EGMSB seperti yang dikehendaki oleh Perenggan 2.114 OECD Transfer Pricing Guidelines For Multinational Enterprise and Tax Administration 2017.

(emphasis added)

[64] Essentially, one of the disputes between the parties was the accounting method applied by the respondent. The respondent did not apply the traditional transactional method, but had applied the transactional profit methods, namely the transactional net margin method (TNMM) in the pricing. This can also be seen from the correspondences between the parties. By a letter dated 22 June 2020, the DGIR issued the final audit findings where the DGIR had rejected the respondent's use of the TNMM method

and had applied the transactional profit split method instead. In response, the respondent reiterated in a letter dated 10 July 2020, that based on the detailed analysis set out in TP Documents, the TNMM method is the most appropriate transfer pricing methodology.

[65] Surely the application of the different accounting methodology and their consequences must be left to the accounting experts to argue before the SCIT. Indeed, the learned judge was also of the opinion that transfer pricing are complex matters and can never be straightforward:

> [50] It has been said that additional assessment is rooted in fairness and that there is a duty on the part of the Respondent being an important public authority to give its reasons more so, when the **issues pertaining to transfer pricing are complex matters and can never be straightforward.** (emphasis added)

[66] The courts are not experts in accounting and will not be able to ascertain the arm's length pricing from reading the affidavits and the TP Documents alone. These are essentially factual issues that must be decided by the SCIT, after hearing the oral evidence of the parties concerned, including the tax and accounting experts. It is trite law that SCIT are the judges of facts. (See: *Kerajaan Malaysia v. Dato' Ghani Gilong* [1995] 3 CLJ 161).

[67] In fact, the respondent referred to the case *MM Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] MSTC 10-046, on the issue of transfer pricing, where the Special Commissioners of Income Tax held that:

> Based on the above citation, we the Special Commissioners are aware of the Respondent's version of the shortcomings in the Appellant's transfer pricing reports, but we do not know what is the Respondent's version of what the transfer pricing reports ought to be in this case, not to mention that such Respondent's version (if it existed) of the reports were not put to the Appellant's witnesses.
>
> Hence, the Respondent is in breach of the principle enunciated in *Aik Ming*'s case (*supra*).

[68] From the case of *MM Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* itself, the issue of transfer pricing is a finding of fact by the SCIT. We reiterate here that the courts are not the proper forum to decide on the merits of the transfer pricing as the same should be resolved by the SCIT.

[69] In *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd* (*supra*), the Federal Court held that:

> [60] Had the respondents filed an appeal before the Special Commissioners, where the onus is on the respondents to establish their position, they will be accorded every opportunity to show where the appellant went wrong. *The respondents may request for the attendance of witnesses to give evidence on oath and request any witness to produce any books, papers or*

documents which are in his custody or his control necessary for purposes of the appeal. Therefore, before the Special Commissioners the respondents will have all the opportunity to ventilate his disgruntlement, with every opportunity to undo what the appellant determined (see *Director-General of Inland Revenue v. Lahad Datu Timber Sdn Bhd* [1977] 1 LNS 26; [1978] 1 MLJ 203). (emphasis added)

[70] In her supporting judgment in the same case (*Alcatel-Lucent*), Justice Zainun Ali FCJ held as follows:

[127] A party who is dissatisfied with an assessment or administrative decision issued by the Revenue under ss. 109 or 109B is not left without any remedy. In the circumstance of this case, *if it is dissatisfied with the assessment or notice of assessment issued by the appellant, the first respondent ought to have exercised its right to appeal under s. 99 of the Act. Before the Special Commissioners, the first respondent would have an opportunity to make known its dissatisfaction. It will have the opportunity to tender exhibits, and give evidence if necessary.*

[128] Thus the first question is answered in the negative. The letter of the Director General of Inland Revenue dated 14 April 2008 referring to both ss. 109 and/or 109B of the Income Tax Act 1967 holds good and is therefore not bad in law.

[129] Referring to question no. 2, *since the respondents failed to file an appeal to the Special Commissioners under s. 99 of the Act, the court should not delve into the merits of the matter which in any case ought to be resolved by the Special Commissioners.* On this, we agree with the view expressed by our learned brother Suriyadi FCJ at paras. 56-64 of his judgment. Thus question 2 need not be answered. (emphasis added)

[71] Gill FJ in *Sun Man Tobacco Co Ltd v. Government Of Malaysia* [1973] 1 LNS 144; [1973] 2 MLJ 163 had occasion to state this:

The doors of justice are not shut to him merely because its claimant is the Government, *but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the DirectorGeneral acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.* (emphasis added)

[72] For the reasons enumerated above, the learned judge was plainly wrong when she went into the merits of the transfer pricing, accepted the respondent's submission and quashed the DGIR's decision. Whilst acknowledging that the transfer pricing issue is a complex matter, the learned judge should have dismissed the review application for the parties to litigate the transfer pricing issue before the SCIT.

(iii) Does The DGIR Have A Duty To Give Reasons For Its Decisions, And If So, Has The DGIR Breached That Duty?

[73] In the High Court, the learned judge made a finding that the DGIR had failed to give proper reasons or explanations:

A [31] It is settled law that the Respondent, as a public decision-making body, is under a duty to give reasons for its decisions. (See: the Federal Court's decision in the *Kesatuan Pekerja-pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-pekerja Bank & Anor* [2017] 4 CLJ 265 and *Pahang South Union Minibus Co. Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199). The duty to give reasons was recently affirmed
B by the Federal Court in *Uniqlo (Malaysia) Sdn Bhd v. Ketua Pengarah Kastam Dan Eksais* [2020] MLJU 1030.

…

[49] *It is apparent that not only the Applicant who is left in the dark as to how the Respondent came to its transfer pricing adjustments. The Court for that matter*
C *is deprive from knowing the Respondent's version of what the transfer pricing report ought to be.* What are the factors did the Respondent consider? Did it perform the most perfunctory functionary and economic analysis? What are the comparable used in the economic analysis and for that matter, did the Respondent comply with its own Transfer Pricing Guidelines?

D (emphasis added)

[74] We are of the considered opinion that the learned judge has failed to consider the exchange of correspondences between the DGIR and the respondent on the assessments, including the contents of such correspondences. After the audit in October 2018, the DGIR had in fact
E given reasons for the adjustments to the respondent. In three separate letters dated 23 October 2019, 30 January 2020 and 22 June 2020, the DGIR had clearly laid down the reasons for the adjustment.

[75] In the letter dated 22 June 2020, in responding to the respondent's letter dated 22 November 2019 and 3 December 2019, the DGIR once again
F explained in detail the reasons for making the adjustments. In this letter, the DGIR had explained how they concluded that the respondent and ELL are associated persons within the meaning of s. 140A(2) of the ITA, the operational structure of the respondent involving other affiliate companies within the Ensco Group of Companies. In this letter, the DGIR has also
G explained to the respondent why the DGIR rejected the method used by the respondent.

[76] The DGIR had also considered the respondent's letters dated 22 November 2019, 3 December 2019, 28 February 2020 and 10 July 2020, disputing the DGIR's audit findings. The parties even had a discussion on
H the matter on 11 February 2020 at the DGIR's office. From the above facts, it cannot be said that the respondent was 'left in the dark' on the issues between the parties.

[77] In *Ketua Pengarah Hasil Dalam Negeri v. Alcatel-Lucent Malaysia Sdn Bhd* (*supra*), the Federal Court held that in tax cases, there is no statutory
I provisions that mandated the DGIR to give reasons:

[91] *Guided by those persuasive cases, judicial interference therefore should be on a case by case basis.* As regards this appeal, we also find *no statutory provision that demands the appellant to supply reasons why the first respondent is duty bound to pay the withholding tax.* Apart from the want of a statutory provision demanding the supplying of reasons, in the *circumstances of the case, with there being more than ample documents or reasons surfacing in the course of the negotiations which are self-explanatory, the need to give an overt explanation is superfluous.*

[92] The Court of Appeal here, *en route* to its decision merely reproduced and discussed a plethora of cases on the trite law or issues regarding the law of judicial review, rather than highlighting where the appellant went wrong prior to making its decision.

[93] To *avoid falling into the same trap of the subordinate courts, after sifting through the available material regarding the decision-making process, we find that the appellant had*:

(a) negotiated with the respondents;

(b) exchanged correspondences with the respondents. The first was the letter of 31 October 2007;

(c) there was even a finding of facts (see para 4 of the COA grounds of judgment) that several meetings and exchanges of correspondences took place between the appellant and the respondents;

(d) the sum was then reduced to RM1,781,274;

(e) a further representation was made by the first respondent and the withholding tax was reduced to RM1,507,674.80 as per the appellant's letter dated 28 March 2008;

(f) then came the impugned letter of 14 April 2008 in which appendix 1 was appended detailing out the amount to be paid and making reference to the relevant provisions;

(g) the respondents protested *vide* letter dated 28 April 2008; and

(h) the appellant warning the respondents of the repercussion of non-payment in both the letters of 28 March 2008 and 14 April 2008.

(emphasis added)

[78] We are therefore of the considered opinion that the DGIR had explained the reasons for his decision, as can be seen from the correspondences between the parties. In any event, in the circumstances of this case, there are ample documents in the course of the negotiations between the parties which are self-explanatory, hence the need to give an overt explanation is redundant. As to whether the said reasons of the DGIR can be accepted, that will be up to the SCIT to make a finding. Therefore, it cannot be said that the DGIR had failed to explain the reasons to the respondent.

Issue Of Limitation Under s. 91(3) of the ITA

[79] The respondent took the position that under s. 91(5) of the ITA, the DGIR has a seven-year period to raise an assessment or additional assessment in respect of transfer pricing adjustments. Section 91(5) of the ITA reads:

> The Director General, where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax in consequence of the Director General's determination pursuant to subsection 140A(3), may in that year or within seven years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year.

[80] In this case, since the DGIR had raised its assessment for YA 2012 on 22 July 2020, the seven-year period had lapsed. The only exceptions to lifting the time-bar are provided under sub-s. 91(3) of the ITA:

> The Director General where it appears to him that:
>
> (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
>
> (b) any person has been negligent,
>
> in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

[81] The learned judge held that the DGIR's failure to particularise the basis for the exercise of its powers under s. 91(3) is fatal, and the court is entitled to infer that there is no good reason to do so:

> [62] The Respondent's failure to particularise the basis for the exercise of its powers under s. 91(3) is fatal, and the Court is entitled to infer that there is no good reason to do so (see *Pahang South Union Minibus Co. Bhd v. Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199.)

[82] However on this issue of limitation, we are of the considered opinion that the SCIT have the jurisdiction to consider, not only as to whether the amount of tax sought to be recovered is excessive, incorrectly assessed or incorrectly increased, but includes a plea of limitation. (See: *Kerajaan Malaysia v. Dato' Ghani Gilong* [1995] 3 CLJ 161).

[83] In fact, the cases that were referred to by the respondent regarding the issue of s. 91(3) of the ITA were from the High Court on appeal, from the decisions of the SCIT on a finding of fact. Since the exceptions include fraud,

wilful default or negligence, these issues cannot be decided by the learned judge based on mere affidavits. These are factual issues that can only be decided by the SCIT after a full hearing.

Conclusion

[84] In the present appeal, we find no exceptional circumstances that warrant the learned judge to quash the notices of assessments issued by the DGIR. The subject matter of this appeal is not similar to the *Ensco Gerudi 2013* case that binds the DGIR as an inferior tribunal. Both cases are on different provisions of the law and the interpretation of s. 140A is subject to a finding of fact, which can only be done by the SCIT, *inter alia*, on the transfer pricing. It is also trite law that the SCIT have the power to hear a question of mixed facts and law.

[85] In conclusion, for the aforesaid reasons, we find that the learned judge has erred in her findings and conclusions that warrant our appellate intervention. We therefore allow the appeal and set aside the decision of the learned judge with costs to DGIR.